LIBRARY
SUPREME COURT, U.S.

Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 19____

NO. 75-776

S. H. DUPUY, EMPLOYER, and LIBERTY MUTUAL INSURANCE COMPANY, CARRIER,
Petitioners

v.

DIRECTOR OF OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON BEHALF OF WEST GULF MARITIME ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

E. D. VICKERY
JAMES PATRICK COONEY
3710 One Shell Plaza
Houston, Texas 77002
AC713-224-8380
Attorneys for Amicus Curiae

ROYSTON, RAYZOR, COOK & VICKERY
Of Counsel

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
Consent of Parties	1
Statement of Interest	2
Questions Presented	3
Introduction	3
Reasons for Granting the Writ	5
Argument	8
Reason No. 1: The Standard of Construction	8
Reason No. 2: The Statutory Definitions	13
Reason No. 3: The Absurdities Created in Other Sections of the Statute	15
1. Section 10—Determination to Pay	15
2. Section 21—Review of Compensation Orders	18
3. Section 15—Invalid Agreements	19
4. Section 4—Liability for Compensation	20
Reason No. 4: Immediate Resolution Needed for Proper Administration of Act	21
Reason No. 5: Approval of Agreed Settlements	24
Conclusion	36
Certificate of Service	37

INDEX TO AUTHORITIES

STATUTES

	Page
5 U.S.C.A. §551(7)	29
5 U.S.C.A. §554	28
33 U.S.C.A. §902(2)	6, 13
33 U.S.C.A. §902(12)	6, 13
33 U.S.C.A. §904	7, 20
33 U.S.C.A. §905	9, 11
33 U.S.C.A. §905(b), as amended (Supp. 1975)	10
33 U.S.C.A. §908(c)(21) and (e)	14
33 U.S.C.A. §908(f)	14
33 U.S.C.A. §908(i)(A), as amended (Supp. 1975)	3, 9, 14, 26
33 U.S.C.A. §909	21
33 U.S.C.A. §910	7, 15
33 U.S.C.A. §914(b) and (i)	14
33 U.S.C.A. §915	7, 19
33 U.S.C.A. §915(b)	4
33 U.S.C.A. §916	4
33 U.S.C.A. §919(d), as amended (Supp. 1975)	4, 27
33 U.S.C.A. §921	6, 18
33 U.S.C.A. §933(b)	10
33 U.S.C.A. §939(c)(1)	33

CASES

	Page
American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951)	19
City of Indianapolis v. Chase National Bank, 314 U.S. 63, 86 L.Ed. 47, 62 S.Ct. 15 (1941)	19
Czaplicki v. SS HOEGH SILVERCLOUD, 351 U.S. 525, 76 S.Ct. 946 (1956)	5, 10
Guiseppi v. Walling (2nd Cir. 1944) 144 F.2d 608	21
Ingalls Shipbuilding Corporation and American Mutual Liability Insurance Company v. Robert E. Spicer and the United States Department of Labor, Benefits Review Board, 5th Cir. No. 74-3465 (Unpublished Order entered April 18, 1975)	25
Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1967)	12
Reed v. Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 *reh. den.* 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963)	5, 11
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)	5, 9
Voris v. Eikel, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953)	5, 8

BLEED THR

REGULATIONS

	Page
20 C.F.R. §702.33(b)	33
20 C.F.R. §702.241	29, 30
20 C.F.R. §702.311	25
20 C.F.R. §702.316	26, 32
20 C.F.R. §801.2(10)	34
20 C.F.R. §802.201(a)	34

OTHER AUTHORITIES

Director, Office of Workmen's Compensation Programs, U.S. Department of Labor v. Jordan, Holmes & Narver, Inc. and Commercial Union Insurance Co. of Newark, N.J., BRB 74-143, 1 BRBS 45 (July 24, 1974)	26
Director, Office of Workmen's Compensation Programs, U.S. Department of Labor v. Wills, H.N.A., Inc., and A.F.I.A. Worldwide Insurance Co. and Commercial Insurance of Newark, BRB 74-147, 1 BRBS 47 (July 30, 1974)	26
House Report 92-1441, 92nd Cong. 2nd Sess., Sept. 25, 1972, p. 11, 1972 U.S. Code Cong. & Adm. News, p. 4708	28
Senate Report No. 92-1125, 92nd Cong. 2nd Sess., Sept. 12, 1972, p. 13	28

IN THE

Supreme Court of the United States

OCTOBER TERM 19____

NO. _____

S. H. DUPUY, EMPLOYER, and LIBERTY MUTUAL INSURANCE COMPANY, CARRIER,
Petitioners

v.

DIRECTOR OF OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF ON BEHALF OF WEST GULF MARITIME ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of the Brief *amicus curiae* in support of the Petition for Writ of Certiorari and such written consent has been filed with the Clerk.

STATEMENT OF INTEREST

The West Gulf Maritime Association is an organization composed of steamship owners, operators, agents, and independent stevedoring companies, totaling some 50 members. Its membership covers the geographical area from the Port of Lake Charles, Louisiana, on the east, to the Port of Brownsville, Texas, on the west. All of the members of the Association are employers of substantial numbers of employees who are covered for injuries and death by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901, *et seq. as amended,* (Supp. 1975), 86 Stat. 1265, (hereafter sometimes referred to as "the Act" or the "Longshoremen's Act"), the construction of certain provisions of which is sought by the Petition for Writ of Certiorari.

The West Gulf Maritime Association is vitally interested in the proper administration of the Longshoreman's Act and is particularly concerned that the agreed settlement procedure under the Act be administered in order to facilitate and encourage the resolution of controverted claims at every stage of the adjudicative process.

The Petition for Writ of Certiorari presently before the Court involves a decision of the United States Court of Appeals for the Seventh Circuit holding that there is no authority for the settlement of death claims under the Longshoremen's Act.[1] The Director of the Office of Workmen's Compensation Programs of the United States Department of Labor has given every indication that he and his office intend to follow this holding, not only in the Seventh Circuit, but on a national basis. As a result of the national application this decision is being given

1. The decision is reported at 519 F.2d 536 (7th Cir., 1975).

and its effect in virtually prohibiting the settlement of controverted death claims under the Longshoremen's Act, the members of the West Gulf Maritime Association are directly interested in this matter and are so situated to be an appropriate organization to file this *Amicus Curiae* Brief in order to acquaint the Court with the views of employers of employees covered by the Act in substantially all segments of the maritime industry regarding the important issues raised by this Petition for Writ of Certiorari.

QUESTIONS PRESENTED

This case presents two questions of first impression in this Court:

First, does the Longshoremen's Act, as amended, authorize agreed lump sum compromise settlements of death claims arising under the Act?

Second, does an Administrative Law Judge have the authority to approve agreed settlements of controverted claims arising under the Longshoremen's and Harbor Workers' Compensation Act?

INTRODUCTION

The approval of agreed settlements of controverted compensation claims arising under the Longshoremen's and Harbor Workers' Compensation Act is authorized by Section 8(i)(A) of the Act, 33 U.S.C.A. § 908(i)(A), *as amended,* (Supp. 1975), which provides in relevant part

> "When the Deputy Commissioner determines that it is in the best interest of an *injured employee entitled*

> *to compensation*, he may approve agreed settlements of the interested parties, discharging the liability of the employer for compensation, notwithstanding the provisions of § 915(b) and § 916 of this title. . ." [2]

The principal question presented to the Court of Appeals in this case was whether the Administrative Law Judge assigned to hear a controverted claim once the formal adjudicative stage of the administrative process was reached was vested with authority to approve agreed settlements by Section 19(d) of the Act, 33 U.S.C.A. § 919(d), *as amended* (Supp. 1975). However, the Court below did not reach this issue and focused on the phrase "injured employee entitled to compensation" contained in Section 8(i)(A) because of a footnote contained in the Director's Brief below expressing doubt that there is authority under the Act to settle death claims. This resulted in holding that Section 8(i)(A) does not authorize the approval of agreed settlements in death claims because the term "injured employee" does not specifically include deceased employees or their dependents. Significantly, even the Director's counsel, the Solicitor of Labor, did not make such a contention nor directly assert that the Court should reach any such result[3] and the issue was not briefed by any of the parties except in conjunction with Petitioners' Motion for Rehearing, which was denied.

---

2. Section 15(b) prohibits an employee from waiving his right to compensation under the Act, 33 U.S.C. §915(b). Section 16 prohibits employees from signing and releasing their right to compensations, 33 U.S.C. §916.

3. We submit the Solicitor of Labor did not because of the absurdities which result when the interpretation made by the Court below of this term is applied in other sections of the Act. See full discussions, *infra*, pages 15 to 21.

It is submitted that the holding of the Court of Appeals, which places a strict interpretation on the words "injured employee entitled to compensation" as used in Section 8(i)(A) so as to exclude deceased employees and the beneficiaries of deceased employees is incorrect and should be taken on certiorari for review by this Court.

REASONS FOR GRANTING THE WRIT

1. The strict construction of the statutory language "injured employee entitled to compensation" is in conflict with and ignores this Court's reported holdings that the Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."

The view of the Court below that the Longshoremen's Act is to be strictly confined to its "precise statutory limitations" [4] is in clear conflict with many decisions of this Court construing various provisions of the Act. If there is any principle of statutory construction which is beyond dispute, it is that the Longshoremen's Act, as this Court has repeatedly stated, "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results".[5] Significantly, none of this Court's decisions construing the Act were referred to or

---

4. 519 F.2d at 541.

5. *Voris v. Eikel*, 346 U.S. 328 at 333, 74 S.Ct. 88, 98 L.Ed. 5, 10 (1953); *See also, Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956); *Czaplicki v. SS HOEGH SILVERCLOUD*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956); *Reed v. Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, *reh. den.* 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963). See full discussion *infra*, pages 8 to 12.

apparently considered by the Court below for guidance in reaching its conclusion.

2. The strict construction of the term "injured employee" completely ignores and is in direct conflict with the statutory definitions of the terms "injury" and "compensation" in the Act.

"Injury" is defined in the Act to mean "accidental injury or death. . ." [6] "Compensation" is defined as ". . . the money allowance payable to an employee or to his dependents. . ." [7] When these statutory definitions are placed in Section 8(i)(A) which authorizes agreed settlements of claims of ". . . an injured employee entitled to compensation. . .", Section 8(i)(A) authorizes agreed settlements of claims of ". . . an injured or dead employee entitled to the money allowance payable to an employee or his dependents. . .". Only by ignoring those definitions can the decision of the Court of Appeals below be sustained.[8]

3. When the same strict construction of the statutory language is applied to the same terms in other sections of the Act, not only do harsh and incongruous results occur, but some real absurdities as well.

These results include:

(a) The Court of Appeals divests itself of jurisdiction. The Court of Appeals is empowered by the Act to review only final orders of the Benefits Review Board, 33 U.S.C.A. § 921. The Board has juris-

---

6. 33 U.S.C.A. §902 (2)

7. 33 U.S.C.A. §902 (12)

8. See full discussion, *infra*, pages 13 to 15.

diction to hear appeals only "with respect to claims of employees", and as no mention is made of claims of dependents or beneficiaries, under the decision of the Court below no appeal is permitted in death cases and the Administrative Law Judge's approval of this settlement is final.

(b) Section 10 [9] of the Act on which the method of determining an injured employee's weekly wages on which his weekly compensation rate is based cannot be used in death cases, since like Section 8(i)(A), Section 10 only uses the terms "employee" or "injured employee" and never refers to or mentions an employee's dependents or beneficiaries.

(c) Section 15 [10] which prohibits "an employee" from waiving his right to "compensation" is invalidated as no mention is made of dependents or beneficiaries in Section 15.

(d) Section 4[11] which requires the employer to secure the payment of compensation (usually through insurance) to "employees" is also invalidated because no mention is made of dependents or beneficiaries.[12]

4. An immediate resolution of this issue is a matter of great importance in the immediate as well as future administration of the Act, and particularly so when it is

9. 33 U.S.C.A. §910

10. 33 U.S.C.A. §915

11. 33 U.S.C.A. §904

12. See full discussion, *infra*, pages 15 to 21.

extremely doubtful that there is any practical way to get this issue before another Court of Appeals so that a potential conflict in the Court of Appeals will result.[13]

5. The Court below, because of the manner in which it resolved this case, left untouched the decision of the Benefits Review Board which was under review holding that only the Deputy Commissioner has authority to approve agreed settlements and therefore neither Judges nor the Benefits Review Board nor the Court of Appeals, nor this Court have authority to approve agreed settlements under Section 8(i)(A) of the Act. 33 U.S.C.A. § 908 (i)(A), *as amended.* (Supp. 1975). Nevertheless, this issue is before the Court, as erroneously decided below, and should also be considered.[14]

ARGUMENT

REASON NO. 1: THE STANDARD OF CONSTRUCTION

The view of the Court below that the Longshoremen's Act is to be strictly confined to its "precise statutory limitations" is clearly erroneous. If there is any principle of statutory construction which is beyond dispute, it is that the Longshoremen's Act, as this Court has repeatedly stated, "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." [15] A brief consideration of only a few of this Court's decisions will quickly demonstrate this proposition.

---

13. See full discussion, *infra*, pages 21 to 24.

14. See full discussion, *infra*, pages 24 to 35.

15. *Voris v. Eikel*, 346 U.S. 328, at 333, 74 S.Ct. 88. 98 L.Ed. 5, 10 (1953)

In the legendary *Ryan* case,[16] this Court construed the following statutory language in Section 5 of the Act:

> "The liability of an employer . . . *shall be exclusive and in place of all other liability of such employer to the employee,* his legal representatives, husband or wife, parents, dependents, next of kin, *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injuries or death* . . ." 33 U.S.C.A. § 905. (Emphasis supplied.)

While it was at that time and still is the view of counsel for the Amicus that this language is plain and unambiguous and does by its very terms prohibit any action by anyone against an employer within the meaning of the Act and that the Act as passed was intended by Congress to be the exclusive liability of the employer, nevertheless this Court held that all this language related to was any tort liability which an employer might have to the employee or anyone else. In so doing it held that the employer was subject to a suit by a third party shipowner who claimed indemnity for any damages it might have to pay an injured employee by virtue of an implied contractual obligation to stow the cargo on its vessel in a reasonably safe and workmanlike manner.[17] The effect

16. *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

17. The typical *Ryan* indemnity case arose as follows: A longshoreman employed by an independent contractor stevedore would be injured on a vessel owned by a third party shipowner. The longshoreman would sue the shipowner for damages based on the unseaworthiness of the ship and/or the negligence of its crew and the shipowner was permitted to sue the independent contractor stevedore for indemnity for any damages the shipowner had to pay the stevedore's injured longshoreman employee. The stevedore's "exclusive liability" under Section 5 thus vanished under

of the Ryan decision was to limit Section 5 of the act to an employer's tort liabilities.

Six months after handing down the *Ryan* decision, the Court decided the *Czaplicki* case,[18] in which it chose to disregard what appeared to be the plain, literal meaning of the language of the Act in construing Section 33(b) which provided as follows:

> "*Acceptance of such compensation under an award* in a Compensation Order filed by the Deputy Commissioner *shall operate as an assignment to the employer of all right* of the person entitled to compensation *to recover damages against such third person* unless such person shall commence an action against such third person within six months after such award." 33 U.S.C.A. § 933(b).
> (Emphasis supplied.)

Even though this Court acknowledged that the statutory assignment provided for in this section of the Act had been fully and completely consummated in complete accordance with the plain statutory language, it went on to hold that Czaplicki could maintain an action against the third party shipowner because the statutory assignee was the insurance carrier for the third party vessel, and as statutory assignee it would in a sense be suing itself. Notwithstanding the apparent literal meaning of the statutory language, the Court concluded that "the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally."

---

the guise of *Ryan* being a contract action—and one implied in law, not just one which a stevedore could voluntarily accept in a written contract. The 1972 Amendments abolished *Ryan* indemnity. *See* 33 U.S.C.A. §905(b), *as amended* (Supp. 1975).

18. *Czaplicki v. SS HOEGH SILVERCLOUD*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956).

Approximately seven years later in the *Yaka* case[19] this Court held that the exclusive liability of the employer to the employee in Section 5 was not to be applied in those circumstances where a longshoreman was employed directly by the shipowner and that such longshoremen were to have the same rights against their own shipowner-employer as did an employee of an independent contracting stevedore against a third party shipowner. Thus, despite the literal meaning of the language contained in Section 5 that "the liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death," 33 U.S.C.A. § 905 (a), in *Yaka,* the Court gave an employee a direct cause of action for unseaworthiness, which later evolved also into a cause of action for negligence, against his own employer, which in effect supplemented his right to compensation benefits under the Longshoremen's Act from his own employer.[20]

Mr. Justice Black justified the Court's decision by saying that "only blind adherence to the superficial meaning of a statute" [21] would permit the denial to a *Yaka* longshoreman the same rights which a longshoreman

---

19. *Reed v. YAKA,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, *Reh. den.* 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963).

20. We have to say "supplemented" rather than in addition to his compensation benefits, for when an employee received compensation benefits and prosecuted his *Yaka* action against his own shipowner employer, upon making a recovery based on unseaworthiness or negligence from his shipowner employer, the *Yaka* employee did have to give the employer credit for the amounts of money that the employer had paid him under the Longshoremen's Act.

21. 373 U.S. 410, 415, 83 S.Ct. 1349, 10 L.Ed.2d 448, 452, (1963).

employed by an independent contracting stevedore had against the vessel on which an injury occurred.

Approximately four years later in the *Jackson* case,[22] the Court reaffirmed its holding in *Yaka*. In declining to construe the language of Section 5 literally and to hold that an employer's exclusive liability to his employee was to be the Longshoremen's Act, Mr. Justice Black, speaking for the Court, stated in part:

> ". . . We cannot accept such a construction of the Act—an Act designed to provide equal justice to every longshoreman similarily situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act." [23]

If these cases stand for anything, they stand for the proposition that the Longshoremen's Act is to be construed liberally to obtain at the very least a reasonable and just result. Moreover, it is not necessary to go as far as this Court has already gone in liberally construing the Act to conclude that the terms "injured employee" and "employee" as used in the Act must be read to include within their meaning deceased employees and the beneficiaries of deceased employees. Any other construction —and certainly the construction taken by the Court below—does violence not only to Section 8(i) of the Act, but to many other provisions of the Act and leads to an "incongruous, absurd and unjust result." To avoid such a result, the instant Petition for Writ of Certiorari must be granted and the decision below reversed.

---

22. *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488, (1967).

23. 386 U.S. 731, 735, 87 S.Ct. 1419, 18 L.Ed.2d 488, 491, (1967).

REASON NO. 2: THE STATUTORY DEFINITIONS

The definitions of the term "injury" and of the term "compensation", as contained in the Act, provide, so far as pertinent here, as follows:

> (2) The term "injury" means accidental injury or *death* arising out of and in the course of employment . . ." (Emphasis supplied) 33 U.S.C.A. § 902(2).
>
> (12) "Compensation" means the money allowance payable to an employee or *to his dependents . . . and includes funeral benefits . . .*" (Emphasis supplied) 33 U.S.C. § 902(12).

Under these definitions, "injured employee" as used in Section 8(i) must be construed to include not just an "injured employee" but a "deceased employee" as well. When so construed, the term employee obviously must include the beneficiaries who are "entitled to compensation"—the "money allowance payable to an employee or to his dependents" under the Act. Even the standard for approval of a settlement—"the best interests of an injured employee"—strictly and literally applied remains appropriate in death cases. The "best interests" of the beneficiaries must surely be to the "best interests" of the employee who is no longer there to provide for them. It is also illuminating to observe that, strictly speaking, Section 8(i) authorizes "agreed settlements of the *interested parties*" rather than agreed settlements between the employee and his employer, provided such settlement is in the "best interests of an injured employee entitled to compensation."

Contrary to what was expressed in the opinion below, the fact that Congress in the 1972 Amendments eliminated all references in Section 8(i) to the "injury" subdivisions (c) (21) and (e) of Section 8 and to Sections 14(b) and (i), providing that the compromise had to be paid in installments unless commuted to present value, indicates the intent of Congress to expand—not to restrict the approval of agreed settlements. The elimination of the requirement from Section 8(i) that agreed settlements had to be approved by the Secretary of Labor also evidences the Congressional intent to expand and not restrict the use of the agreed settlements.[24] Simply because the agreed settlement provisions of the Act are in Section 8, dealing with compensation for injury, and not Section 9, dealing with death benefits, should not be construed to limit settlements to injury cases only, for the second injury fund provisions contained in Section 8(f) encompass both injury and death cases, even though there are no second injury fund provisions in Section 9.

---

24. Section 8(i) of the Act, 33 U.S.C. §908(i) read as follows prior to the 1972 Amendments:

(i) In cases under subdivision (c) (21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the Secretary, approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of sections 915(b) and 916 of this title: *Provided,* That the sum so agreed upon shall be payable in installments as provided in section 914(b) of this title, which installments shall be subject to commutation under section 914(j) of this title: *And provided further,* That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement as provided for in this chapter, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this Section.

We respectfully submit that the statutory definitions and the foregoing factors compel the conclusion that both injury and death claims may be settled under Section 8(i).

REASON NO. 3: THE ABSURDITIES CREATED IN OTHER SECTIONS OF THE STATUTE

A consideration of the application of strict interpretation of the term "injured employee" adopted by the Court of Appeals to four other sections of the Longshoremen's Act quickly demonstrates its erroneousness.

1. Section 10[25]—Determination To Pay

Section 10 of the Act deals in major part with the determination of the average weekly wages on which an employee's weekly compensation rate is based. Subsection (a) provides that the average weekly wage shall be based on the employee's actual earnings if he works substantially the whole of the year, but if not, subsection (b) provides for the average weekly wage to be based on the earnings of some other worker in the same class who worked substantially the whole of the year prior to the injury, and if neither of the conditions of subsections (a) or (b) exist, subsection (c) provides the average weekly wage shall be based on what should reasonably represent the annual earning capacity of a worker considering various factors. In Section 10 (a) - (e) of the Act, Congress uses the term "injured employee" a total of seven times and the term "employee" a total of five times. Nowhere in Section 10 (a) - (e) does Congress ever refer to claims which will be made by an employee's beneficiaries in the event the injuries results in his death.

---

25. 33 U.S.C.A. §910, *as amended,* (Supp. 1975).

Thus, using the interpretation of the terms "injured employee" and "employee" as not including a deceased employee's beneficiaries in the event of his death, the method of determining the average weekly wage on injury claims provided for in Section 10 cannot be used in determining death benefits under the Act. This would mean that in a death case one could only look to the actual average weekly wages of the deceased employee in ascertaining the average weekly wages upon which death benefits are to be determined according to Section 9. The significance of such an interpretation, of course, is that if the employee did not work substantially the whole of the year prior to the injury, his beneficiaries would have to have their benefits determined by what the deceased employee himself actually earned and not his reasonably anticipated earnings under the alternative provisions of Section 10(b), relating to the wages of a similar worker employed for substantially the whole of the year, or on what would reasonably represent his earning capacity under the provisions of Section 10(c).

An example will best illustrate the harsh and incongruous result which this produces. Assume an employee sustained an injury on February 1 from which he died 10 months later on December 1; that his average weekly wage was $150 per week but he did not work substantially the whole of the year prior to his injury; that the injured employee therefore relied on subsections (b) or (c) of Section 10, and the average weekly wage on which he was entitled to have his compensation based was found to be $300 per week.[26] In this assumed situation, the employee

26. These are realistic figures. In fact the difference could be even greater as some longshoremen earn far more than $300.00 per week and some far less than $150.00 per week.

would receive compensation at the rate of $200 per week based on the average weekly wage of $300 found under Section 10(b) or (c) during the 10 months of his disability prior to his death. However, if Section 10 (a) - (e) applies only to "claims of injured employees" as the Court below construes the term "injured employee" the death benefits to which the employee's beneficiaries would be entitled would have to be based on the deceased's own average weekly wages under Section 9. These are only $150 a week, which would give his beneficiaries compensation at the rate of only $100 per week or one-half of what the employees received for his disability.[27] However, if the terms "injured employee" and "employee" are properly construed to include an employee's beneficiaries, the beneficiaries would receive $200 per week in compensation since they too could rely on Section 10(a) - (b) - (c) in determining the average weekly wage on which their death benefits are to be based.[28]

We respectfully submit that in using the terms "injured employee" and "employee" in Section 10 of the Act, it is obvious that Congress intended to include not only living employees, but the beneficiaries of deceased employees as well. The same words should not be given an entirely different interpretation in Section 8 (i) as has been done by the Court below.

---

27. While this may not seem unduly harsh or incongrous since there is one less person to support after the employee's death, we do not think anyone would contend that Congress did not intend for the same average weekly wage to be used in determining both disability and death benefits.

28. Assuming at least two beneficiaries, such as a widow and one child survive. Even if only the widow survives, she would receive $150.00 per week, rather than $100.00 per week as the Court below would have it.

2. Section 21[29]—Review Of Compensation Orders

If the strict interpretation of the terms "injured employee" and "employee" which excludes a deceased employee's beneficiaries is followed, neither a Court of Appeals or the Benefits Review Board will have jurisdiction to review the action of the Administrative Law Judge in a death case arising under the Act and in this case the Court of Appeals for the Seventh Circuit should have entered an order directing the Benefits Review Board to set aside its order reversing the decision of the Administrative Law Judge and to dismiss the appeal to the Board for lack of jurisdiction. Section 21(b) (3) authorizes the Benefits Review Board "to hear and determine appeals . . . from decisions with respect to *claims of employees* . . ." (Emphasis supplied)[30] If the term "employee" does not include deceased employees' beneficiaries, then there is no statutory authority for a review of the Administrative Law Judge's decision approving the agreed settlement by the Benefits Review Board. Nowhere does this Section of the statute in any way refer to a death claim, a deceased employee, or to a deceased employee's beneficiaries, but as is true in Section 8 (i), refers only to employees and not their beneficiaries.

In turn, there would be no jurisdiction in the Courts of Appeal because Section 21, which is the sole source of such jurisdiction, gives to the Courts of Appeal the power to review only "A final order of the Board.[31] Obviously,

---

29. 33 U.S.C.A. §921.

30. 33 U.S.C.A. §921(b)(3).

31. 30 U.S.C.A. §921(c). Of course, it is basic Hornbook law that any judicial tribunal must examine and determine whether it has jurisdiction, if necessary on its own motion, if the issue is not

if the Benefits Review Board has jurisdiction to review only "decisions with respect to claims of employees," and the Courts of Appeal can review only final orders of the Board, the Seventh Circuit's interpretation of the term "injured employee" in Section 8(i) effectively divests the Courts of Appeal of jurisdiction in death cases. Thus, to be consistent with its strict interpretation of Section 8(i), the Court below should have entered an order remanding the case to the Board with directions to dismiss the appeal from the Administrative Law Judge's decision for lack of jurisdiction.

Neither Section 8(i) nor Section 21 should be so strictly construed as to produce such a harsh and incongruous result.

3. Section 15—Invalid Agreements[32]

Section 15 is the usual provision contained in most compensation acts which prohibits any agreement by an employee to pay a portion of the premium paid for coverage under the Act. Subsection (b) of Section 15 provides:

> "(b) No agreement by an *employee* to waive his right to compensation under this chapter shall be valid." (Emphasis supplied)

Here again, this Section of the statute refers only to an *employee* and makes no mention of a *deceased employee's beneficiaries*. Thus, if the Seventh Circuit's strict interpre-

---

raised by the parties. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

32. 33 U.S.C.A. §915.

tation of the meaning of "employee" is adhered to, an employer would be free to require the employee's potential beneficiaries to pay a part of his insurance premium and after the employee's death, to settle any claim that the beneficiaries might have under the Longshoremen's Act by simply obtaining their agreement to waive their rights to compensation under the Act. If the strict interpretation placed on Section 8(i) of the Act by the Court below is followed, the Act prohibits only an employee from waiving his rights to compensation, not his beneficiaries. This, of course, would have the obvious effect of eliminating any necessity of obtaining the approval of any person, whether Deputy Commissioner, Administrative Law Judge or otherwise, of any settlement of a death claim under the Act. As the lower Court's opinion notes, this is neither customary nor desirable and, so far as we know, is not permitted by any workmen's compensation act, for such acts universally require approval of settlements by some appropriate authority charged with the administration or the adjudication of claims.

4. Section 4—Liability For Compensation[33]

Section 4(a) of the Act provides:

> "Every employer shall be liable for and shall secure the payment to his *employees* of the compensation payable under Sections 907, 908, and 909 of this title . . ." 33 U.S.C. §904(a). (Emphasis supplied)

Once again the strict construction of the term "employee" as applied by the Court below to Section 8(i) when applied to this Section of the Act means that the

33. 33 U.S.C.A. §904.

employer must secure the payment of compensation to his "employees" but not to his deceased employee's beneficiaries. While this Section refers to securing the payment of compensation under "death benefits" Section 9 of the Act, this reference to Section 9 becomes meaningless since the employer has to secure the payment of compensation only to his "employees" and an "employee" obviously is not entitled to any compensation for his own death, as Section 9 demonstrates.

We believe that a consideration of these four sections of the Act is sufficient to demonstrate that the literal interpretation placed on the meaning of the term "employee" in Section 8(i) relating to agreed settlements by the Court below is incorrect. We submit it is as equally obvious in Section 8(i), as it is in the other four sections of the Act discussed, that Congress did not intend the word "employee" to be limited to this extent, but used it in the broadest possible sense to encompass not simply living employees, but deceased employees' benefiiciaries as well. This is, of course, entirely consistent with the statutory definitions of the term "injury" and of the term "compensation" as used in the Act. As was observed by Judge Learned Hand concurring in *Guiseppi* v. *Walling*, (2nd Cir. 1944) 144 F. 2d 608, 624, "There is no surer way to misread any document than to read it literally . . ."

REASON NO. 4: IMMEDIATE RESOLUTION NEEDED FOR PROPER ADMINISTRATION OF ACT

If the decision below is allowed to stand without review by this Court and if it is acquiesed in by those officials of the Department of Labor who are charged with administering the Act and the administrative process it contem-

plates, as appears will be the case, it will no longer be possible to compromise and settle controverted death claims that arise under the Act. The parties will thus be forced to litigate all controverted death claims whether they wish to or not, with the prospect for each of an "all or nothing" result. The facts of this case provide a dramatic example of the "all or nothing" gamble that will (and is being) faced by employees and employers alike. If it is found in this case that blood transfusions would have saved the deceased employee's life and that such transfusions were unreasonably refused by the deceased employee, his dependent wife will receive nothing; if the finding is to the contrary, she will receive the full amount of death benefits available to her under the Act. There will be no middle ground; no room for compromise. There can be little doubt of the injustice of this approach. This is to say nothing of the effiect this approach will have on the administration of the Act. If the "all or nothing" approach were extended to our District Courts, there could be no doubt that the effects would be little short of disasterous. This case is clearly of great significance to all those who are affected by the Longshoremen's Act and concerned with the administration of the various compensation programs which are controlled by the Act.

One of the most compelling reasons for the allowance of the Writ is that in all reasonable probability the issue of whether the Longshoremen's Act authorizes the approval of the agreed settlement of death claims will never again be ripe for judicial review. The reason for this is obvious. If, as presently appears to be the case, the decision of the Court below is followed throughout the nation by the various administrative officers charged with adjudicating claims under the Act on a uniform basis,

whenever a compromise settlement of a controverted death claim is presented for approval, approval will be denied and the parties will be required to litigate. Once the merits of the claim have been adjudicated, it is very unlikely that the issue raised by the refusal to approve the settlement can be presented for judicial review. For instance, if the decision below is followed, any application for approval of an agreed settlement in a death case would be denied by the Deputy Commissioner at an informal conference at the outset of the administrative process. Once the claim was litigated at a formal evidentiary hearing before an Administrative Law Judge, the losing party would be seeking review in an attempt to overturn the result on the merits and the initial application for approval of the settlement would not be preserved in the record on which review could be sought.

Review of a disallowance of an agreed death claim settlement could be obtained, if at all, only on the basis of the employee's beneficiaries and the employer agreeing to abide by the settlement which had been disallowed regardless of who prevailed on the formal hearing, with the sole purpose of creating conflict among the Courts of Appeal. As a practical matter this is not a realistic possibility. Likewise, it is not reasonable to expect a Deputy Commissioner, Administrative Law Judge or the Benefits Review Board to approve a settlement in a death case, as was done by the Administrative Law Judge in this case, in the face of the acceptance of the holding below by the Secretary of Labor, since all of these — the Deputy Commissioners, the Administrative Law Judges, and members of the Benefits Review Board — serve to some extent at the pleasure of the Secretary of Labor.

The inescapable conclusion is that it is not probable that the issue of death claim settlement approval will be again considered by a Court of Appeals or that the question will ripen into a traditional "conflict among the circuits" situation and then again be presented to this Court for consideration. If *certiorari* is not granted here, the decision of the Seventh Circuit will in all probability be the final word on the question unless Congress chooses to intervene. For this reason alone, the Court should take this opportunity to consider the issue and resolve it.

REASON NO. 5: APPROVAL OF AGREED SETTLEMENTS

As pointed out at the outset, the original issue presented to the Court of Appeals in this case was whether an administrative law judge is authorized to approve agreed settlements among the parties in controverted claims arising under the Longshoremen's Act, as amended. In holding that the Act does not authorize the agreed settlement of death claims, the Court below found it unnecessary to reach this issue.

It is the position of the West Gulf Maritime Association, however, that the Benefit Review Board's decision should also be considered and that the underlying question of the Administrative Law Judge's settlement approval authority be considered and clarified by the Court. The question of authority to approve settlements under the Act is obviously of great significance to the future administration of the Act and should be decided now, rather than later, so that the application of this aspect of the Act may be uniform among the Circuits, particularly in view of the fact the Benefit Review Board's position has

already been rejected by the Court of Appeals for the Fifth Circuit.[34].

The Director of the Office of Workmen's Compensation Programs of the United States Department of Labor has taken the position that the power to approve settlements of controverted claims under the amended Act is vested exclusively in the regional Deputy Commissioners of the Office of Workmen's Compensation Programs and that the Administrative Law Judge assigned to hear and decide a controverted claim under the Act once it reaches the formal evidentiary hearing phase of the adjudicative process is without authority to approve settlements agreed to by the parties.[35] This position has been upheld by the Benefits Review Board of the U. S. Department of Labor

---

34. The Fifth Circuit granted a Motion to Approve Compromise settlement submitted by the parties in a Longshore Act injury case on appeal from the Benefits Review Board in an unpublished order. *Ingalls Shipbuilding Corporation and American Mutual Liability Insurance Company v. Robert E. Spicer and the United States Department of Labor, Benefits Review Board,* No. 74-3465 (Order entered April 18, 1975). The Secretary of Labor opposed approval of the settlment by the Court and filed a Motion for Remand.

35. A two stage adjudicative process has been established under the Regulations issued by the Secretary of Labor, 20 C.F.R. 702, et seq. After the filing of a Notice of Contravention by an employer, the Deputy Commissioner or his designee calls an informal pre-hearing conference or conferences, 20 C.F.R. §702.311, in order "to resolve disputes with respect to claims in a manner to design to protect the rights of the parties and also resolve such dispute at the earliest practical date." *Id.* at §702.311. If agreement on all issues cannot be reached at the informal pre-hearing conference stage, the Deputy Commissioner is to transfer the case to the Office of the Chief Administrative Law Judge for a formal evidentiary hearing. 20 C.F.R. §702.316.

in the order presently before this Court for review and in two to subsequent orders.[36]

The West Gulf Maritime Association submits that Director's position is based on a misreading of the applicable provisions of the amended Act and imposes on the parties — claimaints, employers and carriers alike — an unncessarily duplicative and uncertain procedure that has the effect of discouraging the settlement of controverted claims after completion of the informal stages of the Act's adjudicative process.

As noted above, Section 8 (i) (A) of the Act initially vests the authority to approve the settlement of controverted claims agreed to by the parties in the Deputy Commissioner. The Act therefore clearly provides that the Deputy Commissioner has the duty, power, and responsibility to approve agreed settlements, obviously only so long as the claim is under his administrative jurisdiction. If the claimant and the employer-insurance carrier are unable to reach an agreement on all issues before the Deputy Commissioner, the Deputy Commissioner must then transfer the claim to the Office of the Chief Administrative Law Judge for an evidentiary hearing on any remaining disputed issues.[37] The Director has contended below, and the Benefits Review Board has held, that when this transfer is made, the Deputy Commissioner retains the power,

---

36. *Director, Office of Workmen's Compensation Programs, U.S. Department of Labor v. Jordan, Holmes & Narver, Inc.*, and *Commercial Union Insurance Co. of Newark, N.J.*, BRB 74-143, 1 BRBS 45, (July 24, 1974); *Director, Office of Workmen's Compensation Programs, U.S. Department of Labor v. Wills, H.N.A., Inc.* and *A.F.I.A. Worldwide Insurance Co.* and *Commercial Insurance of* Newark, BRB 74-147, 1 BRBS 47, (July 30, 1974).

37. 20 CFR §702.316.

duty and responsibility to approve agreed settlements under the Act. The erroneousness of this position is found in the plain and unequivocal language of Section 19(d) of the Act:

> "Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of Section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner [administrative law judge] qualified under Section 3105 of that Title. *All powers, duties, and responsibilities vested by this chapter, on October 27 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners [administrative law judges].*" 33 U.S.C.A. § 919(d), *as amended* (Supp. 1975) (bracketed expressions and emphasis supplied.)

Prior to the 1972 Amendments to the Act, the Deputy Commissioner not only presided over the informal administrative procedures with respect to a claim, but also served as the hearing officers at any formal evidentiary hearing and decided any issue which the parties were unable to resolve by agreement through informal administrative procedures. It is undisputed that the Deputy Commissioner had the power to approve agreed settlements under Section 8(i) both during the course of their informal administrative procedures and during their formal evidentiary hearing procedures prior to the 1972 Amendments.[38] This power to approve such agreed settle-

38. While the Deputy Commissioner's power to approve agreed settlements prior to the 1972 Amendments was subject to the "approval of the Secretary" of Labor or his designee, this was clearly one of his "powers, duties and responsibilities" on the date of enactment of the 1972 Amendments, October 27, 1972.

ments during the formal evidentiary hearing procedures was expressly taken from the Deputy Commissioners and "vested" in the Administrative Law Judges when Congress added Subsection (d) to Section 19 of the Act in amending it in 1972.[39]

The authority to approve settlements agreed upon by the interested parties is basically an adjudicative function and therefore is a power, duty or responsibility with respect to an evidentiary hearing of a controverted claim delegated to the Administrative Law Judge under Section 19(d) of the Act. Indeed, the power to approve the settlement of controverted matters being adjudicated before any tribunal, whether judicial or quasi-judicial, is inherent in the power to adjudicate.

Section 554 of Title 5, United States Code, under which any formal evidentiary hearing under the Longshoremen's Act is required by Section 19(d) to be conducted, provides in part:

---

39. While the language used by Congress in Section 19(d) is clear and unambiguous and no resort to legislative history is necessary, the legislative history established that it was the intent of Congress to transfer not just a part, but *all* of the Deputy Commissioner's powers, duties, and responsibilities with respect to the evidentiary hearing procedures under the Act to the Administrative Law Judges. In relevant part the House Report states:

> " . . . It is the Committee's belief that the admiration of the Longshoremen's and Harbor Workers' Compensation Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. Moreover, with the new responsibilities that will desolve upon the Secretary with the passage of this bill, it will be extremely important to have fulltime able administrators who will not have to wear the dual hat of being hearing officers for the purpose of the disputes brought under this statute." House Report 92-1441, 92nd Cong., 2nd Sess., Sept. 25, 1972, page 11; 1972 U.S. Code Cong. & Administrative News, p. 4708.

The Senate Report contains an identical statement, Senate Report No. 92-1125; 92nd Cong., 2nd Sess., Sept. 12, 1972, p. 13.

"(c) The agency [here the Offices of Workmen's Compensation Programs through the Administrative Law Judge] shall give all interested parties opportunity for

(1) the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment when time, the nature of the proceedings and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with Section 556 [dealing with hearings] and 557 [dealing with decisions] of this title." 5 U.S.C.A. § 554(c). (Bracketed expressions supplied.)

Section 554 applies "in every case of adjudication required by statute to be determined on the record and the opportunity for an agency hearing", 5 U.S.C.A. § 554(a), and "adjudication", in turn, is defined under the Administrative Procedure Act as "agency process for the formulation of an order." 5 U.S.C.A. § 551(7).

Significantly, the Department of Labor has itself recognized the adjucative nature of the approval of agreed settlements under the amended Act by requiring in its regulations on the subject, 20 CFR § 702.241, that a *record* be made through the filing of an application which "shall set forth fully all facts necessary to disclose the status of the case and the reason for seeking approval of an agreed settlement under said section of the Act as well as the specific terms of such agreed settlement, and

shall be accompanied by a medical report of examination of the employee. . ." *Id.* § 702.241(b). Subsection (c) of the Regulation goes on to require that "If the deputy commissioner determines that the injured employee is entired to compensation and that the proposed agreed settlement . . . is for the best interests of such employee, he shall file a *compensation order* making necessary *findings of fact* relative to the character and quality of disability and effect of same with respect to the employee's wage and wage-earning capacity prior to approving such settlement and discharging the employer's liability for compensation payments. . ." (Emphasis supplied.)

From this, it is clear that the approval of agreed settlements of controverted claims under the amended Act is an adjudicative function as defined by the Administrative Procedure Act, 5 U.S.C.A. § 500 *et seq.*, and therefore included within the powers, duties, or responsibilities delegated by Section 19(d) of the amended Act to the Administrative Law Judge assigned to preside over a formal evidentiary hearing and render a decision on a controverted claim.

As the Director of the Office of Workmen's Compensation Programs and the Benefits Review Board would have it, a settlement reached after a controverted claim entered the formal evidentiary hearing phase of the adjudicative process could not be approved by the presiding Administrative Law Judge assigned to that case, even though the approval of such a settlement is clearly an adjudicative function and even though standards to be employed in determining whether such approval should be granted are clearly set out in the applicable regulation, which requires that appropriate findings of fact and a

BLEED

compensation order be entered. Instead, the Director and Board would have the formal evidentiary hearing terminated, the claim remanded to the Deputy Commissioner, and a separate procedure instituted before the Deputy Commissioner in which a detailed application would be filed, findings of fact made and a compensation order entered, if the Deputy Commissioner approved.

This approach creates many practical difficulties which can have no other effect than the discouragement of agreed settlements. For example, assume that during a recess in a formal evidentiary hearing before an Administrative Law Judge, the parties, as a result of trial developments, determine that it would be in their mutual best interest to settle the claim. Upon re-entering the hearing room and informing the Administrative Law Judge that settlement had been agreed to, they might be told, if the position of the Director and the holding of the Board is adopted, that the Administrative Law Judge has no authority to approve a settlement, but that he would remand the case to the Deputy Commissioner to allow the parties to make the necessary application to the Deputy Commissioner for approval of their settlement. If the Deputy Commissioner refused to approve the settlement, as he is empowered to do under Section 8(i)(A) of the amended Act, the Deputy Commissioner would return the case to the Administrative Law Judge who would then have to reset and resume the formal evidentiary hearing as if it was still a contested and disputed claim, now unnecessarily delayed and bifurcated.[40] It would also be possible for the Administrative

40. Since all of the administrative law judges are stationed in Washington, D.C., resetting and resuming the hearing is not a simple or inexpensive task. The only alternative to this would be

EED THROUGH

Law Judge to refuse to suspend the hearing and allow the parties to make their application to the Deputy Commissioner only after the conclusion of the hearing, thereby creating a "race to judgment" between the Administrative Law Judge and the Deputy Commissioner. Neither situation would be conducive to the encouragement of settlements at the formal evidentiary hearing stage of the proceedings.[41]

The holding of the Benefits Review Board, for which review is being sought, in effect gives a Deputy Commissioner a "Russian veto" by which he can require an Administrative Law Judge to fully hear and render a decision on a claim when all of the parties—claimant, employer and insurance carrier—and even the Administrative Law Judge believe it should be settled based on an agreement of the parties.[42] How much more efficient

---

for the deputy commissioners to attend all formal hearings so they could approve or disapprove an agreed settlement if one was reached by the parties during the course of a hearing. Two hearing officers to decide different but at the same time issues to be determined from the same evidence at the same hearing is a rather ludicrous prospect.

41. While it is difficult to see how the Director and the Board have arrived at the conclusion that the Deputy Commissioner and Administrative Law Judge have concurrent jurisdiction—once the case has been transferred to the Office of the Chief Administrative Law Judge as required by the Director's own regulations, 30 CFR §702.316, this is precisely the position of both the Director and the Board.

42. Indeed, if the Administrative Law Judge never acquired the power (jurisdiction) to approve agreed settlements because it remained vested solely in the Deputy Commissioner, neither this Court nor a Court of Appeals would have the power to approve an agreed settlement of the parties, but rather would be required to await advices from the Deputy Commissioner either that he had approved the settlement or would not do so, which effectively would amount to an order or direction to a Court of Appeals to decide a

BLEED

and economical it would be for the Administrative Law Judge to hear the application for settlement and either approve it and enter the appropriate findings of facts and compensation order or disapprove the application and compensation order or disapprove the application and immediately return to the evidentiary hearing on the merits of the controverted claim. It is submitted that these are precisely the type of practical problems Congress intended to prevent by the enactment of Section 19(b) of the Act, delegating to the Administrative Law Judge *all*, not just some, of the powers, duties and responsibilities previously vested in the Deputy Commissioner with respect to formal evidentiary hearings.

The West Gulf Maritime Association can appreciate the Director's legitimate concern for the integrity of the programs he administers and the rights of the beneficiaries thereunder, but is unable to understand the reluctance of the Director to recognize the power of an Administrative Law Judge to approve or disapprove agreed settlements during the formal evidentiary hearing phase on a controverted claim. In any event, the Director's concerns are fully protected in several ways:

1. The Regulations made the Director an "interested party" at any such formal evidentiary hearings who may fully participate in such hearings.[43]

---

case that the Court believed should be settled! This position has been rejected by the Court of Appeals for the Fifth Circuit. *See* footnote 34, *supra*. Also see full discussion under Reason No. 3, supra, pages 11 to 16.

43. 20 CFR §702.33(b) defining parties to a formal hearing so provides:

"(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested Party."

EED THROUGH

2. The Administrative Law Judge involved in this area are entrusted by express statutory and regulatory provision with the adjudication of all contested claims. Surely, the persons who are charged with the application of the provisions of the Longshoremen's Act and the policy which underlies it through the adjudication of contested matters arising under the Act, will apply those same provisions and policies with equal vigor in those cases where the parties reach an agreed settlement during the course of the evidentiary hearing procedures.

3. The claimants are always represented by an attorney at the formal stage of the adjudicative process, usually one of their own selection or one recommended by a Deputy Commissioner, or upon their request, one furnished by the Secretary of Labor as provided in Section 39(c)(1), of the Act, 33 U.S.C.A. § 939(c)(1), as amended, (Supp. 1974).

4. Should the Director be dissatisfied with an Administrative Law Judge approval or disapproval of an agreed settlement, the Regulations give him the right to appeal the compensation order approving or disapproving such a settlement to the Benefits Review Board. In this regard, it is noteworthy that the compensation order entered in this case was appealed to the Benefits Review Board by the Director pursuant to these regulations.[44]

---

44. 20 CFR §802.201(a) provides "Any party in interest . . . may appeal . . ." and Section 801.2(10) provides that the terms " 'Party' or 'Party in interest' means the Secretary [of Labor] or his designee. . . .", among others.

One of the main purposes of any adjudicative process, be it judicial or administrative, is to encourage the fair, equitable and expeditious settlement of disputes. Indeed, it is Hornbook law that the encouragement of settlements is one of the strongest policies of the law. If the position espoused in the decision of the Benefits Review Board for which review is being sought is followed, the settlement of controverted claims under the Longshoremen's Act will be discouraged once they reach what is the equivalent of the trial stage in the United States District Courts. This will be unfortunate, for as any experienced trial lawyer or trial judge knows, many cases, particularly personal injury cases, frequently do not settle, and often cannot be settled, until the trial stage has been reached and often expose the litigants to an all or nothing "roll of the dice" exposure if no settlement is possible. While early settlements are to be encouraged, late settlements ought not to be discouraged.

The West Gulf Maritime Association therefore respectfully submits that the express provisions of Section 19(d) of the Act, the practical conduct of formal evidentiary hearings by Administrative Law Judges and the policy of law to encourage settlements compel the conclusion that an Administrative Law Judge hearing a controverted claim brought under the Longshoremen's Act has the power, duty and responsibility to approve and/or disapprove settlements agreed to by the parties as their discretion may dictate. The Petition for Writ of Certiorari should be granted so that this important issue can be decided.

CONCLUSION

For the various reasons discussed above, the West Gulf Maritime Association, *amicus curiae,* respectfully urges that the Petition for Writ of Certiorari filed herein be granted and that the decision of the Court below be reversed.

Respectfully submitted,

E. D. VICKERY

JAMES PATRICK COONEY

Attorneys for West Gulf Maritime Association
Suite 3710
One Shell Plaza
Houston, Texas 77002
713/224-8380

Of Counsel:

ROYSTON, RAYZOR, COOK & VICKERY
Suite 3710
One Shell Plaza
Houston, Texas 77002
713/224-8380

BLEED THRO

CERTIFICATE OF SERVICE

I, E. D. Vickery, one of the attorneys for West Gulf Maritime Association, *Amicus Curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of November, 1975, I served copies of the foregoing Brief of Amicus Curiae in Support of Petition For Writ of Certiorari on the several parties as follows:

1. On the Petitioners, S. H. Dupuy and Liberty Mutual Insurance Company, by mailing three copies in a duly addressed envelope, with first class, air mail postage prepaid, to their attorney of record, Mr. Carl N. Otjen, Esq. of Otjen, Philipp & Van Ert, S.C., 741 N. Milwaukee Street, Suite 900, Milwaukee, Wisconsin 53202.

2. On the Respondent, the Director of the Office of Workmen's Compensation Programs, United States Department of Labor, by mailing three copies in a duly addressed envelope, with first class, air mail postage prepaid, to his attorney of record, the Honorable Robert H. Bork, Solicitor General of the United States, United States Department of Justice, Constitution Avenue and Tenth Street, N.W., Washington, D.C. 20530.

E. D. VICKERY
Attorney for West Gulf Maritime Association, Amicus Curiae
3710 One Shell Plaza
Houston, Texas 77002
AC713-224-8380